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No. 89-742

In the Supreme Court of the United States

OCTOBER TERM, 1989

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS, PETITIONER

v.

CARROLL F. YOUNGBLOOD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the retroactive application of a purely procedural change in the law that does not render an otherwise innocent act criminal, increase the punishment for a crime, or deprive the defendant of any defense otherwise available violates the constitutional prohibition on *ex post facto* laws.

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INTEREST OF THE UNITED STATES

This case presents the question whether a statute mandating a change in criminal procedure may be applied to the prosecution of crimes committed before the statute was enacted. The *Ex Post Facto* Clauses of the Constitution, Art. I, § 9, Cl. 3, and Art. I, § 10, Cl. 1, apply to both the federal government and the States. The United States therefore has a significant interest in the resolution of this case, which may shed light on the question of when statutes that affect the conduct of criminal trials may be applied retroactively.

STATEMENT

1. Under Texas criminal procedure, the defendant has a right to have the jury, rather than the court, determine punishment after a verdict of guilty has been returned. Tex. Code Crim. Proc. Ann. art. 37.07 (Vernon 1981 & Supp. 1990). In accordance with this provision, after respondent was convicted of aggravated sexual abuse, a jury trial was held on the issue of punishment. The judge instructed that respondent could be sentenced to prison for not less than 15 nor more than 99 years, and that respondent could be fined up to $10,000. Pet. App. B1. The jury assessed punishment of life imprisonment and a $10,000 fine. The jury returned its verdict on March 17, 1982. Pet. App. D2.

On November 23, 1983, the Texas Court of Criminal Appeals decided *Bogany* v. *State,* 661 S.W.2d 957 (en banc), in which it held that the Texas legislature had not authorized a monetary fine to be assessed under Tex. Penal Code Ann. § 12.42(c) (Vernon 1974), the sentencing provision under which the *Bogany* defendant, as well as respondent, had been sentenced. The court found that, because Texas law did not grant authority to appellate courts to reform a jury verdict, the only remedy for the unauthorized fine was to remand the case for a new trial, at which the jury would be instructed that no fine could be assessed. 661 S.W.2d at 959. See also *Ex parte Johnson,* 697 S.W.2d 605 (Tex. Crim. App. 1985).

On August 13, 1984, respondent's conviction was affirmed in an unpublished opinion. Pet. App. C1. On September 19, 1984, respondent filed an application for a writ of habeas corpus, relying on the *Bogany* case. On April 2, 1985, the trial court recommended that the writ issue.[1] Pet. App. A1-A2. On June 11, 1985, however, a

[1] Under Texas law, only the Court of Criminal Appeals may grant a writ of habeas corpus. Tex. Code Crim. Proc. Ann. art. 11.07 (Vernon 1977 & Supp. 1990).

statute went into effect to remedy the problem created by *Bogany*. The statute provided that if a jury assesses a punishment that is authorized by law and a punishment that is not authorized by law, the trial or appellate court shall "reform the verdict to show the punishment authorized by law and omit the punishment not authorized by law." Tex. Code Crim. Proc. Ann. art. 37.10(b) (Vernon Supp. 1990). Therefore, on October 16, 1985, the Texas Court of Criminal Appeals applied the new statute to respondent's case, denied respondent's petition for a writ of habeas corpus, and reformed the verdict to omit the $10,000 fine. Pet. App. B1-B4.

Respondent then sought a writ of habeas corpus from a federal district court. He alleged that applying Article 37.10(b) to his case violated the constitutional prohibition on *ex post facto* laws.[2] The district court denied the petition, holding that "the retroactive application [of Article 37.10(b)] * * * does not criminalize and punish a prior action, aggravate a crime * * *, inflict a greater punishment, nor alter the legal rules of evidence," and therefore "does not fall within the classic definition of an *ex post facto* law." Pet. App. C5-C6.

The Fifth Circuit reversed. The court rejected the State's argument that a statute cannot violate the *Ex Post Facto* Clauses unless it punishes as a crime a previously innocent

[2] In both the district court and the court of appeals, the State argued that respondent had not exhausted his state remedies. Both courts rejected this argument, on the ground that it was clear after the decisions of the Court of Criminal Appeals in *Ex parte Johnson,* 697 S.W.2d 605 (Tex. Crim. App. 1985), and in respondent's own case that any further recourse to state remedies would be futile. See Pet. App. C3-C4, D3-D4. The petition for a writ of certiorari does not renew the contention that respondent failed to exhaust state remedies.

act, makes more burdensome the punishment of a crime after its commission, or deprives the defendant of a defense available at the time the act was committed. Pet. App. D7. Instead, the court ruled that even "statutes regulating procedure will violate the *Ex Post Facto* clause if they deprive the defendant of a 'substantial right given to him by the law in force at the time to which his guilt relates.' " Pet. App. D6 (quoting *Thompson* v. *Utah,* 170 U.S. 343, 352 (1898)). Thus, because there was no dispute that Article 37.10(b) was applied retrospectively in this case, the "salient issue," as the court of appeals saw it, was simply whether "the law operated to disadvantage the accused in the exercise of a substantial right or protection that he previously enjoyed." Pet. App. D8. Because, in the court's view, the statute "altered [respondent's] right to retrial—a substantial right—to his material disadvantage," the court of appeals directed that respondent be afforded a new trial. Pet. App. D10.

Judge Jones wrote a concurring opinion in which she suggested that the distinction between "mere modes of procedure" that may be applied retrospectively and "substantial or vital protections" that may not is "a wobbly one." Pet. App. D10. She noted that, if the *Ex Post Facto* Clauses bar even those " 'procedural' changes that do not affect the traditional *ex post facto* concerns," she could find no "overriding principle" on which to disagree with the panel's decision. Pet. App. D12. Judge Gee also wrote a brief concurring opinion. Agreeing with Judge Jones' observations concerning the "modes of procedure" cases, he observed that the cases "constitute[ ] more of a bright spectrum than a bright line." Pet. App. D10.

SUMMARY OF ARGUMENT

The constitutional prohibition of *ex post facto* laws is a limitation only on statutes that on their face or in effect retrospectively define crimes or prescribe punishments. Although statutes labeled "procedural" may fall within the proscription, they do so only when they operate retrospectively to alter the definition of a crime, to restrict the scope of a defense, or to increase the prescribed punishment. Accordingly, this Court has routinely upheld retrospective application of procedural changes, regardless of whether they disadvantage defendants in particular cases.

The statute at issue in this case was on its face and in effect a procedural statute. It did not on its face or in effect modify the definition of any crime or change the prescribed punishment for any crime. The statute simply granted appellate courts the authority to correct certain kinds of errors in criminal judgments. By enlarging the authority of the appellate courts, the statute denied respondent the windfall of a new trial that he would have obtained under prior procedures. As such, the case is governed by this Court's decision in *Mallett* v. *North Carolina,* 181 U.S. 589 (1901), which held that retrospective application of a statute that enlarged the scope of appellate review was constitutional.

To permit retrospective application of the Texas statute does no violence to the values underlying the *Ex Post Facto* Clauses. Because the new statute did not alter the definition of respondent's crime or the punishment prescribed for it, Texas law gave respondent fair warning; he could therefore have had no reliance interest in the unusual Texas procedural rules that were in effect at the time he committed the crime. Nor did the enactment of a

procedural remedy such as the statute at issue here, applicable to a wide range of different cases, threaten arbitrary or vindictive action by the legislature to punish a particular unpopular individual or group.

ARGUMENT

THE *EX POST FACTO* CLAUSES OF THE CONSTITUTION DO NOT PROHIBIT RETROSPECTIVE APPLICATION OF THE PROCEDURAL STATUTE AT ISSUE IN THIS CASE.

A. The Constitutional Prohibition Of *Ex Post Facto* Laws Extends Only To Statutes That On Their Face Or In Effect Retrospectively Alter The Definition Of Crimes Or The Prescription Of Punishments.

In an oft-quoted passage in his opinion in *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798), Justice Chase enumerated the legislative acts that fall within the prohibitions of the *Ex Post Facto* Clauses of the Constitution:

> "1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*."

3 U.S. at 390 (emphasis in original). Aside from the fourth category, which is not at issue in this case,[3] the prohibition

[3] Insofar as the fourth category is seen to prohibit the application of new evidentiary rules to cases involving conduct that occurred before the new rules were promulgated, it has been overtaken by succeeding cases. See, *e.g.*, *Thompson* v. *Missouri*, 171 U.S. 380 (1898) (retroactive application of statute making admissible handwritten documents as handwriting exemplars held constitutional); *Hopt* v. *Utah*, 110 U.S. 574, 588-590 (1884) (retroactive application of statute making felons competent to testify at trial held constitutional).

of *ex post facto* laws focuses on legislative changes in the definition of crimes, punishments, and defenses. The court of appeals erred in mistaking the narrow constitutional prohibition of *ex post facto* legislation for a broad-ranging proscription of any change in the legal system that may adversely affect a defendant whose criminal conduct took place before the change was made. This drastic expansion of the scope of the *ex post facto* prohibition, which is not supported by this Court's cases and which would cause substantial confusion and disuniformity in the administration of the criminal law, should be rejected.

1. Although the *Calder* v. *Bull* explanation has been formulated in slightly different ways in later cases, the Court has consistently placed central emphasis on the core prohibition of retrospective changes in either the definition of crimes (and available defenses) or the severity of punishments. See, *e.g.*, *Beazell* v. *Ohio*, 269 U.S. 167, 169 (1925); *Rooney* v. *North Dakota*, 196 U.S. 319, 325 (1905); *Duncan* v. *Missouri*, 152 U.S. 377, 382 (1894); *Gut* v. *State*, 76 U.S. (9 Wall.) 35 (1869).

It is true, as the court of appeals noted, that the prohibition is not limited to statutes that on their face modify definitions of particular crimes and the punishments specified for them. See Pet. App. D6-D8. For example, in *Beazell* v. *Ohio*, the Court noted that "there may be procedural changes which operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition." 269 U.S. at 170. See also

Miller v. *Florida,* 482 U.S. 423, 433 (1987); *Weaver* v. *Graham,* 450 U.S. 24, 29 (1981). Yet, statements that procedural changes can be within the reach of the *Ex Post Facto* Clauses have generally been coupled with recognition that the Clauses were not intended to limit "legislative control of remedies and modes of procedure which do not affect matters of substance." *Beazell,* 269 U.S. at 171; see also *Miller,* 482 U.S. at 433; *Dobbert* v. *Florida,* 432 U.S. 282, 293 (1977). The Court's cases certainly do not support the view that the *Ex Post Facto* Clauses prohibit all retrospective procedural changes that might operate to the detriment of a criminal defendant.

In short, although there may be procedural changes that require scrutiny under the *Ex Post Facto* Clauses, the purpose of such scrutiny ordinarily is to determine whether such changes, although labeled "procedural," in fact operate to modify the definitions of crimes and punishments. Similarly, although there may be cause to inquire for purposes of the *ex post facto* prohibition whether procedural changes "affect matters of substance," the "matters of substance" at issue are those that are the special concern of the *Ex Post Facto* Clauses—changes in legislative definitions of crimes and defenses and prescriptions of punishment.

2. The Court has routinely upheld retrospective application of procedural changes when those changes did not on their face or in effect modify definitions of crimes or punishments. For example, the Court has sanctioned the retrospective application of a statute that eliminated a criminal defendant's right to insist on a severance from his co-defendants, *Beazell* v. *Ohio,* 269 U.S. 163 (1925), and it has upheld statutes that reversed evidentiary rules that had rendered handwriting exemplars inadmissible, *Thompson* v. *Missouri,* 171 U.S. 380 (1898), or made convicted felons incompetent to testify, *Hopt* v. *Utah,* 110 U.S. 574, 588-

590 (1884). Similarly, the Court has upheld statutes that changed the qualifications of jurors, *Gibson* v. *Mississippi,* 162 U.S. 565 (1896), modified the composition of appellate panels, *Duncan* v. *Missouri,* 152 U.S. 377 (1894), and gave the State a right to appeal adverse decisions of an intermediate appellate court, *Mallett* v. *North Carolina,* 181 U.S. 589, 592-597 (1901).

The Court's most recent precedent dealing with an *ex post facto* challenge to procedural changes, *Dobbert* v. *Florida,* 432 U.S. 282 (1977), is consistent with this line of cases. In *Dobbert,* the Court upheld a new death-penalty sentencing statute that substantially altered the division of responsibility between judge and jury for imposing the death sentence.

Any of the changes at issue in this line of cases could determine whether a particular defendant is found innocent or guilty, or could, as in *Dobbert,* dramatically affect his punishment. Nonetheless, because none of them on their face or in effect modified the definitions of crime or the legislative prescriptions of punishment, all of them were held to be "procedural," and therefore not in violation of the *Ex Post Facto* Clauses.

The court of appeals relied primarily on *Thompson* v. *Utah,* 170 U.S. 343 (1898), to support its conclusion that the *Ex Post Facto* Clauses forbid retrospective application of procedural statutes. See Pet. App. D6. By generalizing from that unusual case, the court erred. *Thompson* arose at the time Utah was undergoing a change in status from Territory to State. While Utah was a Territory, defendants were entitled to a jury of 12; when it became a State, a local statute limited the jury's size to eight persons. The Court held that the right to a 12-person jury that obtained during the territorial period was required by the Sixth Amendment, and that a person who committed a crime

during that period could not be tried by a jury of less than 12.[4]

The *Thompson* Court was plainly concerned with the state statute's impact on the defendant's Sixth Amendment right to trial by jury at a time long before *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), which applied that right to the States. The Court's analysis is premised on its view that the Utah statute eliminated a "right that was regarded, at the time of the adoption of the Constitution, as vital for the protection of life and liberty, and which he enjoyed at the time of the commission of the offense charged against him." 170 U.S. at 352. The issue that the Court found to be presented in *Thompson*—a procedural change that deprived the defendant of a constitutional right he had previously enjoyed—arose only because of the unusual circumstances of that case and is unlikely to recur. For that reason, *Thompson* should not be given broad application to modern *ex post facto* claims. This case, for example, has none of the constitutional overtones that animated the Court's analysis in *Thompson*.

The other cases on which the court of appeals relied similarly provide no support for a broad extension of the prohibition of *ex post facto* laws to preclude retrospective application of procedural statutes. *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277 (1866), and *Ex parte Garland*, 71

[4] The Court's assumption that the Sixth Amendment requires a 12-person jury has been undercut by *Williams* v. *Florida*, 399 U.S. 78 (1970). Insofar as the *Thompson* Court relied on that assumption, its result may not survive *Williams* in any event. Cf. *Ballew* v. *Georgia*, 435 U.S. 223, 230 (1978) (opinion of Blackmun, J.) (*Thompson* was "set to one side" in *Williams*). See also *State* v. *McIntosh*, 23 Ariz. App. 246, 532 P.2d 188 (Ct. App. 1975); *State* v. *Maresca*, 173 Conn. 450, 453, 377 A.2d 1330, 1332-1333 (1977); *Iseton* v. *State*, 472 N.E.2d 643, 650-653 (Ind. App. 1984). But see *McSears* v. *State*, 247 Ga. 48, 48-52, 273 S.E.2d 847, 848-850 (1981).

U.S. (4 Wall.) 333 (1866), involved post-Civil War legislation disabling individuals from following certain professions unless they took oaths that they had not engaged in or encouraged armed aggression against the United States. To be sure, neither statute directly related to the definition of crimes or the prescription of punishments, as the court of appeals recognized. Pet. App. D8. Yet, both statutes imposed a penalty—the deprivation of the right to pursue one's occupation—that was seen as comparable to a criminal sanction. *Cummings*, 71 U.S. (4 Wall.) at 327-328; *Garland*, 71 U.S. at 377-378. See *Burgess* v. *Salmon*, 97 U.S. 381, 385 (1878). Thus, both cases fall well within the traditional proscription of retrospective application of statutes defining criminal conduct and punishment. Because neither case involved a statute that could reasonably be characterized as "procedural," neither statute lends any support to the result the court of appeals reached in this case.[5]

Finally, the court of appeals correctly cited two recent cases for the proposition that two elements—retrospectivity and disadvantage to the defendant—are "critical * * * for a law to fall within the *ex post facto* prohibition." Pet. App. D4 (citing *Miller* v. *Florida*, 482 U.S. 423 (1987), and *Weaver* v. *Graham*, 450 U.S. 24, 29 (1981)).

[5] *Kring* v. *Missouri*, 107 U.S. 221 (1882), is sometimes seen as involving a "procedural" statute barred by the *Ex Post Facto* Clauses. In *Kring*, the Court held that a statute eliminating a rule that a guilty plea to a second-degree murder was an acquittal of first-degree murder could not be applied retrospectively. Yet, as the Court later explained, the question in *Kring* was "whether the statute of Missouri deprived the defendant of any right of defence which the law gave him when the act was committed." *Thompson* v. *Missouri*, 171 U.S. 380, 384 (1898). Thus, the *Kring* result is best seen as an instance of the ban on retrospective removal of defenses, a traditional concern closely related to the general proscription of retrospective changes in the definition of criminal conduct. See generally *Thompson*, 171 U.S. at 383-384.

Yet, although both of these elements are essential for a law to be held unconstitutional as *ex post facto,* neither case stands for the broad proposition that retrospectivity and disadvantage to the defendant are sufficient, without more, to render a procedural statute unconstitutional.

In *Weaver,* the Court held that a statute reducing the amount of automatic "gain time" to which a prisoner is entitled may not be applied retrospectively. The case clearly involved provisions affecting either the length of time the prisoner would serve or the conditions of his confinement. See 450 U.S. at 32. The statute thus fell directly within the *Calder* v. *Bull* proscription of any law that "*changes the punishment,* and inflicts a greater punishment, than the law annexed to the crime, when committed." 3 U.S. (3 Dall.) at 390 (emphasis in original).

In *Miller,* the Court held invalid retrospective application of changes in the State's sentencing guidelines that attached a stiffer presumptive sentence to the defendant's crime. The analysis in *Miller* further emphasizes the need to focus on definitions of crimes and prescriptions of punishment in cases raising *ex post facto* challenges. The Court's conclusion that retrospectivity and disadvantage to the defendant are the critical elements in determining whether application of the new sentencing guidelines was constitutional does not lead to the conclusion that retrospectivity and disadvantage alone—in a case in which a change in prescribed sentences is not at issue—are sufficient to invalidate application of a statute. The Court made quite plain that "no *ex post facto* violation occurs if the change in the law is merely procedural and does 'not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt.' " 482 U.S. at 433 (quoting *Hopt* v. *Utah,* 110 U.S. 574, 590 (1884)). Although the Court recognized that a statute that "takes a seemingly procedural form" may operate to increase punishment or change the ingredients of the offense, *ibid.,* the Court did not in any way suggest that procedural changes that do not have those effects may not be applied retrospectively.

In short, the test for an *ex post facto* violation, derived from this Court's cases over the past 175 years and only recently restated in *Miller,* focuses on changes in the definitions of crime and prescriptions of punishment. If a statute explicitly changes the definition of a crime or the prescription of punishment for criminal conduct, it may not be applied retrospectively if it substantially disadvantages the defendant. If a statute appears to be procedural, but in effect operates to change the definition of a crime or the prescription of punishment, it too may be unconstitutional under similar conditions. But if a statute is procedural in nature and does not operate to change the definition of a crime or the prescription of punishment, it fits squarely within the ordinary rule that a court should apply the law as it finds it. See *Bradley* v. *Richmond School Board,* 416 U.S. 696, 711 (1974); *Thorpe* v. *Housing Authority,* 393 U.S. 268, 281 (1969); *United States* v. *Schooner Peggy,* 5 U.S. (1 Cranch) 103, 110 (1801).

B. Because The Statute At Issue Here Does Not Alter The Definition Of Any Crime Or The Prescription Of Any Punishment, Its Retrospective Application To Respondent's Case Is Constitutional.

1. Because the statute at issue here—Article 37.10(b) of the Texas Code of Criminal Procedure—is a legislative change relating to the allocation of responsibility for correcting a trial error, it is appropriately categorized as a "procedural" statute for purposes of the *ex post facto* prohibition. The statute does not on its face or in effect change in any way the conduct that is deemed criminal under Texas law, nor does it alter the punishment pre-

scribed for such conduct. Therefore, it may be applied in the adjudication of cases involving criminal conduct that occurred prior to its enactment.

Article 37.10(b) was intended to address the problem created by the decision of the Texas Court of Criminal Appeals in *Bogany* v. *State*, 661 S.W.2d 957 (1983) (en banc). Like respondent, the defendant in *Bogany* had been convicted of a serious felony and sentenced by the jury to a term of imprisonment and a $10,000 fine, despite the fact that Texas law did not authorize a fine for his offense. The *Bogany* court held that under Texas law "[t]he authority of a court on appeal to reform the judgment and sentence does not extend to the situation" in which the verdict was "unauthorized by law." 661 S.W.2d at 958. See also *Ex parte Johnson*, 697 S.W.2d 605, 607 (Tex. Crim. App. 1985). Because there was no way to correct the verdict, the case was remanded for a new trial.

As set forth in *Bogany*, Texas law prior to the enactment of Article 37.10(b) gave the courts extremely limited authority with respect to punishment imposed by a jury. The courts apparently had authority only to enter the sentence precisely as determined by the jury, or to reverse the sentence and remand for an entirely new trial if any element of the sentence was illegal. The judgment could not be modified to eliminate the unauthorized element of the punishment while keeping the valid portion of the judgment intact. See *Bogany*, 661 S.W.2d at 958.

A new trial in the *Bogany* situation was required simply because no judicial body had authority to correct erroneous sentences. The *Bogany* rule thus resulted in a pure windfall to the defendant.[6] He obtained another opportunity to be found innocent, despite the fact that there was no error claimed with respect to the jury's determination of guilt. In addition, he gained another opportunity to obtain a shorter sentence of imprisonment, despite the fact that there was no infirmity claimed with respect to the jury's determination of the appropriate term of imprisonment. The new trial could proceed exactly as the old trial, with the same evidence, the same arguments, and the same instructions; the sole difference in the trials was that the jury at the second trial would not be instructed that it could impose a fine, and presumably would not do so.

Article 37.10(b) eliminated that windfall by granting the courts authority to conform a jury's sentence to law, in circumstances in which one element of the punishment assessed by the jury is unauthorized. In so doing, the statute simply enlarged the scope of appellate review and, in particular, added an additional remedy to correct an unauthorized verdict. It was never a part of the punishment prescribed for respondent's crime that, if the jury assesses a punishment one of whose elements is unauthorized by law, the perpetrator is entitled to another opportunity to prove his guilt. Both before and after the change, the punishment authorized for respondent's crime was 15 to 99 years' imprisonment. In addition, both before and after the change, respondent was entitled to have his sentence within that range determined by a jury, and it was so determined.

2. Because Article 37.10(b) affects only the law of remedies—and in particular the allocation of authority for

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[6] Indeed, the legislature's decision to enact Article 37.10(b) remedied a dangerous disincentive to correct trial error created by the *Bogany* decision. A defendant who knew that the trial court would instruct the jury that it could assess a punishment that was in fact unauthorized would be expected not to object and, indeed, to encourage submission of the faulty instruction. For if the instruction was submitted and the defendant convicted, the defendant would automatically gain the right to a new trial and, thus, a new opportunity to have a jury find him innocent.

correcting trial errors—application of the statute in this case is strongly supported by the numerous cases recognizing that changes in the remedies available for correcting trial defects are procedural and thus may be applied retrospectively. See, *e.g.*, *Dobbert* v. *Florida*, 432 U.S. 282, 293 (1977); *Beazell* v. *Ohio*, 269 U.S. 167, 171 (1925) (*Ex Post Facto* Clauses not intended "to limit the legislative control of remedies"); *Thompson* v. *Missouri*, 171 U.S. 380, 386 (1898) ("Remedies must always be under the control of the legislature."); *Gibson* v. *Mississippi*, 162 U.S. 565, 590 (1896). Of particular relevance is *Mallett* v. *North Carolina*, 181 U.S. 589 (1901). In *Mallett*, the intermediate state appellate court overturned the defendant's conviction. Although at the time of the crime the State did not have authority to take an appeal from the intermediate appellate court to the state Supreme Court, the State relied on a newly enacted statute to take such an appeal. This Court held that, despite the fact that applying the new statute would plainly operate to the disadvantage of the defendant, the statute was not an *ex post facto* law within the meaning of the constitutional prohibition. 181 U.S. at 597.[7]

The reasoning of the court of appeals contradicts this Court's holding in *Mallett*. The court of appeals applied a test under which *any* retrospective change that "material-[ly] disadvantage[d]" the defendant or denied him a "substantial 'protection' " was prohibited, regardless of whether it affected the definition of the crime or the legislatively prescribed punishment. Pet. App. D9. But the right to an acquittal that the *Mallett* defendant would have received under prior law is certainly more "substantial" than "the right [at issue in this case] to have one's guilt

[7] *Mallett* was recently applied in *Nilson Van & Storage Co.* v. *Marsh*, 755 F.2d 362 (4th Cir.), cert. denied, 474 U.S. 818 (1985).

retried before a different jury—with its attendant possibility that the outcome might be different the second time around." *Ibid.* Thus, the decision of the court of appeals in this case cannot be reconciled with this Court's decision in *Mallett*.

In both *Mallett* and this case, prior law gave the defendant a windfall when certain types of errors occurred. In *Mallett*, the windfall arose when an intermediate appellate court erroneously overturned a conviction, while in this case it arose when the jury erroneously assessed an unauthorized punishment. In both cases, a statute enacted after the date of the defendant's crime gave the State a new remedy for error—appeal to the state Supreme Court in *Mallett*, reformation of the verdict in this case—that had not existed under prior law. The Court's decision in *Mallett* should therefore control the result in this case.

3. Applying Article 37.10(b) to respondent's case is consistent with the values underlying the *Ex Post Facto* Clauses. Most important of those values is the need "to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver* v. *Graham*, 450 U.S. 24, 28-29 (1981). See also *Miller* v. *Florida*, 482 U.S. 423, 430 (1987); *Dobbert* v. *Florida*, 432 U.S. 282, 297-298 (1977). It cannot reasonably be argued that respondent, or any other individual, relied in any way on the *Bogany* quirk in Texas procedural law before undertaking his criminal conduct. Both before and after the enactment of Article 37.10(b), Texas law gave precisely the same answer to the question whether respondent's conduct was criminal and what punishment ought to be prescribed for that conduct. Therefore, application of Article 37.10(b) in this case

in no way deprived respondent of fair warning or intruded upon any reasonable reliance interest.

The other important value underlying the *Ex Post Facto* Clauses is the need for protection against the danger of arbitrary and vindictive legislation. *Miller* v. *Florida,* 482 U.S. at 430; *Weaver* v. *Graham,* 450 U.S. at 29 (citing cases). In this case, however, there is no reason to believe that the State legislature, in enacting Article 37.10(b), intended to do anything other than remedy a legal anomaly without prejudicing any substantial right of any defendant. As with procedural changes generally, the breadth of their application militates against any suggestion that either animus toward particular defendants or the use of the criminal law as a pretext to deprive disfavored individuals of their liberty underlay enactment of the statute.

As the *Mallett* Court recognized, "it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice * * * in existence when its facts arose." 181 U.S. at 596-597 (citation omitted). Defendants do not have a vested right in every important aspect of the procedural system in effect at the time the crime was committed. Because the decision of the court of appeals would create just such a right out of the Constitution's *ex post facto* prohibitions, it should be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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